No. 09-1546

IN THE
Supreme Court of the United States

W. R. GRACE & CO., ET AL.,

Petitioners,

v.

MARGARET CHAKARIAN; JOHN DOES 1-1000; HOME SAVING TERMITE CONTROL; ABNER DEFENDANTS; CAROL GERARD; KERI EVANS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

August 2, 2010

TABLE OF AUTHORITIES

Page(s)

Cases

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006) 4, 6

Bowles v. Russell,
551 U.S. 205 (2007) 4

Chick Kam Choo v. Exxon Corp.,
486 U.S. 140 (1988) 7

Dolan v. United States,
130 S. Ct. 2533 (2010) 4

Eberhart v. United States,
546 U.S. 12 (2005) (*per curiam*) 5

Entergy, Ark., Inc. v. Nebraska,
210 F.3d 887 (8th Cir. 2000) 1

Gilliam v. Foster,
61 F.3d 1070 (4th Cir. 1995) (*en banc*) 1

Henderson v. Shinseki,
No. 09-1036, __ U.S. __,
2010 WL 752370 (June 28, 2010) 4

In re Baycol Prods. Litig.,
593 F.3d 716 (8th Cir. 2010) 2

In re Dow Corning Corp.,
280 F.3d 648 (6th Cir. 2002) 3

In re Excel Innovations, Inc.,
502 F.3d 1086 (9th Cir. 2007) 2

In re Johns-Manville Corp.,
517 F.3d 52 (2d Cir. 2008),
rev'd, 129 U.S. 2195 (2009) 1

In re Zale Corp.,
62 F.3d 746 (5th Cir. 1995) 1

Jaskolski v. Daniels,
427 F.3d 456 (7th Cir. 2005) 1

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 4

Kontrick v. Ryan,
540 U.S. 443 (2004) 5

Lorillard Tobacco Co. v. Chester, Willcox & Saxbe,
589 F.3d 835 (6th Cir. 2009) 2

Morrison v. National Australia Bank Ltd.,
130 S. Ct. 2869 (2010) 4, 6

Reed Elsevier, Inc. v. Muchnick,
130 S. Ct. 1237 (2010) 4, 6

Scarborough v. Principi,
541 U.S. 401 (2004) 5

Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO,
__ F.3d __, 2010 WL 2681330 (9th Cir. 2010) .2

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 3

Sycuan Band of Mission Indians v. Roache,
54 F.3d 535 (9th Cir. 1994) 2

Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs,
130 S. Ct. 584 (2009) 4

Statutes

11 U.S.C. §105(a) 5

28 U.S.C. § 1334(b) 1, 4, 5

The Libby Claimants contend that this case is all about federal subject-matter jurisdiction, and accuse Grace of seeking "a radical expansion of bankruptcy jurisdiction." Opp. 2. That charge is ironic, since the whole point of the petition is that the issue of subject-matter jurisdiction here is a red herring. There is no question that the bankruptcy court below had subject-matter jurisdiction under 28 U.S.C. § 1334(b) over the adversary proceeding filed by Grace in its own Chapter 11 case—neither the Libby Claimants nor the Third Circuit nor the district court nor the bankruptcy court ever denied that fundamental point. The only question here is whether, in *addition* to that jurisdiction, the bankruptcy court *also* had to exercise jurisdiction over the Montana actions to enjoin them as a remedy in the federal case.

The Third Circuit below, like the Second Circuit in *In re Johns-Manville Corp.*, 517 F.3d 52, 60-65 (2d Cir. 2008), *rev'd on other grounds*, 129 U.S. 2195 (2009), and the Fifth Circuit in *In re Zale Corp.*, 62 F.3d 746, 751-52 (5th Cir. 1995), answered that question in the affirmative, and broadly held that a bankruptcy court must exercise subject-matter jurisdiction over a state-court action to enjoin it as a remedy in a federal case, *see* Pet. App. 19-21a & n.11. Other circuits, in sharp contrast, have affirmed injunctions against state proceedings over which there was no conceivable basis for federal jurisdiction, including criminal and administrative proceedings. *See* Pet. 17-18 (citing *Jaskolski v. Daniels*, 427 F.3d 456, 459-60 (7th Cir. 2005); *Entergy, Ark., Inc. v. Nebraska*, 210 F.3d 887, 900 (8th Cir. 2000); *Gilliam v. Foster*, 61 F.3d 1070, 1083 & n.11 (4th Cir. 1995) (*en banc*); *Sycuan Band of*

Mission Indians v. Roache, 54 F.3d 535, 538-41 (9th Cir. 1994)); *see also Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*, __ F.3d __, 2010 WL 2681330, at *5-10 (9th Cir. 2010) (affirming injunction against state proceedings without analyzing federal subject-matter jurisdiction over those proceedings); *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 589 F.3d 835, 843-51 (6th Cir. 2009) (same). Indeed, the Eighth Circuit has specifically rejected the argument that a federal court "lacked subject matter jurisdiction" to enjoin federal-court litigants from pursuing a state-court action; as that Court explained, the party seeking the injunction "did not seek to remove" the state proceedings to federal court, "but rather to enjoin them." *In re Baycol Prods. Litig.*, 593 F.3d 716, 725-26 (8th Cir. 2010).

The Libby Claimants' only response to this conflict is to argue that the former are bankruptcy cases while the latter are not. *See* Opp. 18-24. But that is a classic distinction without a difference. The *source* of federal subject-matter jurisdiction has no bearing on the question whether a federal court must exercise jurisdiction over a state proceeding to enjoin it as a remedy in a federal case. Once it is established that a federal court has subject-matter jurisdiction over a case, the only question that remains is the scope of the court's *substantive* power to enjoin a state proceeding as a remedy in that federal case. No further jurisdictional inquiry is necessary or appropriate, regardless of the source of the federal court's subject-matter jurisdiction in the first place. *See, e.g.*, *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1093-1100 (9th Cir. 2007) (analyzing bankruptcy-court injunction of state proceeding

without reference to federal subject-matter jurisdiction over that proceeding); *In re Dow Corning Corp.*, 280 F.3d 648, 656-57 (6th Cir. 2002) (same).

The Libby Claimants thus miss the point by insisting that bankruptcy cases are different because federal bankruptcy jurisdiction is "broad." Opp. 22. Whether federal jurisdiction in a particular area is broad or narrow may relate to the question whether a federal court has jurisdiction over a case in the first place. But that is simply not the issue here, given the bankruptcy court's undisputed jurisdiction over the adversary proceeding filed by Grace in its own bankruptcy case. Rather, the issue here is whether a federal court acting in a case concededly within its subject-matter jurisdiction (whatever the source of that jurisdiction) must also exercise subject-matter jurisdiction over a state proceeding to enjoin it as a remedy in the federal case. That is a general question of federal judicial power, not a specific question of bankruptcy jurisdiction.

The key point here, which the Third Circuit misunderstood but other circuits have not, is that a federal court does not exercise *adjudicatory* authority over a state proceeding by simply stopping that proceeding in its tracks as a remedy in a federal case. To enjoin a state proceeding is not (as the Libby Claimants would have it) "to actually adjudicate" that proceeding. Opp. 3. Accordingly, the federal court need not exercise subject-matter jurisdiction over the state proceeding. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (defining "subject-matter jurisdiction" as "the courts' statutory or constitutional power to *adjudicate* the case") (emphasis modified).

The Libby Claimants thus err by asserting that "[t]his case presents no confusion between jurisdictional and substantive limitations, other than what Grace now attempts to sow." Opp. 2. This case is a poster child for such confusion, and the opposition brief only highlights the point. The Libby Claimants insist that "[t]he statute applied by the Third Circuit, 28 U.S.C. § 1334(b), is unquestionably jurisdictional." Opp. 2. But that just begs the fundamental question whether the bankruptcy court was required to exercise subject-matter jurisdiction under that statute *not only* over the adversary proceeding filed by Grace in its own bankruptcy case *but also* over the Montana proceedings sought to be enjoined as a remedy in that federal case. As noted above, other circuits recognize that a federal court's power to enjoin a state proceeding as a remedy in a federal case is a matter of its substantive remedial authority, not its subject-matter jurisdiction.

This case, in short, is all about the distinction between a court's substantive authority and its subject-matter jurisdiction, a distinction to which this Court has recently devoted considerable attention. *See, e.g.*, *Henderson v. Shinseki*, No. 09-1036, U.S. , 2010 WL 752370 (June 28, 2010) (order granting certiorari); *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2876-77 (2010); *Dolan v. United States*, 130 S. Ct. 2533, 2538-39 (2010); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010); *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 130 S. Ct. 584, 596-97 (2009); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-36 (2008); *Bowles v. Russell*, 551 U.S. 205, 211 (2007); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-16 (2006); *Eberhart v.*

United States, 546 U.S. 12, 15-16 (2005) (*per curiam*); *Scarborough v. Principi*, 541 U.S. 401, 412-14 (2004); *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004). Although the Libby Claimants dismiss this distinction as "exotica," Opp. 20, it goes to the very core of the judicial function.

The limits on a court's substantive authority (here set forth in 11 U.S.C. §105(a)) are not the same as the limits on its subject-matter jurisdiction (here set forth in 28 U.S.C. § 1334(b)). Thus, a determination that a federal court lacks subject-matter jurisdiction over a state proceeding under § 1334(b) does not mean that a federal court lacks the substantive remedial authority to enjoin that proceeding under § 105(a). Here, no court has conducted the requisite § 105(a) analysis because the lower courts all concluded that such an analysis was unwarranted unless and until the bankruptcy court could exercise subject-matter jurisdiction over the Montana actions under § 1334(b). *See* Pet. App. 10-12a, 30-31a, 46-47a. By endorsing that approach, and framing the issue here in terms of a federal court's "*jurisdiction* to enjoin" a state proceeding, Opp. 3 (emphasis added), the Libby Claimants only highlight their own confusion over the difference between jurisdictional and substantive limitations on federal judicial authority.

It follows from the foregoing points that Grace is neither "tr[ying] to sneak around the jurisdictional requirement" nor "depart[ing] from the principle that federal courts are courts of limited jurisdiction." Opp. 15, 16. Rather, Grace is simply asking the courts not to analyze an issue of their substantive remedial power under the erroneous rubric of

subject-matter jurisdiction. *See, e.g.*, *Morrison*, 130 S. Ct. at 2876-77 (lower court erred by characterizing substantive limitation on judicial authority as jurisdictional); *Reed Elsevier*, 130 S. Ct. at 1243-49 (same); *Arbaugh*, 546 U.S. at 515-16 (same). The Libby Claimants prove nothing by observing that "Section 105 does not provide an *independent* source of federal subject matter jurisdiction," Opp. 16 (emphasis added; internal quotation omitted), because no "independent" source of jurisdiction is necessary to enjoin state proceedings as a remedy in a case already within federal subject-matter jurisdiction.

Indeed, the Libby Claimants only underscore their own confusion about the distinction between jurisdictional and substantive limitations on a federal court's authority by arguing that "this case does not implicate the Anti-Injunction Act or *Younger* abstention" because "[t]he Third Circuit denied the requested injunction on other grounds." Opp. 1. The Third Circuit denied the requested injunction on the ground that the bankruptcy court lacked subject-matter jurisdiction over the state proceedings sought to be enjoined. *See* Pet. App. 10-22a. The premise of that ruling is that a federal court must exercise subject-matter jurisdiction over a state proceeding to enjoin it as a remedy in a federal case. *See* Pet. App. 10-12a. And that premise cannot be squared with the Anti-Injunction Act or *Younger* abstention, which impose limitations on federal judicial power to enjoin state proceedings totally different from (and inconsistent with) the exercise of federal subject-matter jurisdiction over such proceedings. Indeed, the *Younger* doctrine (which applies to state *criminal* proceedings) would make no

sense if a federal court could only enjoin those state proceedings over which it could independently exercise subject-matter jurisdiction.

The bottom line here is that the Third Circuit below expressly rejected Grace's argument that "a federal court need not exercise subject-matter jurisdiction over a state-court action in order to enjoin it," Pet. App. 10a (internal quotation omitted), and thereby exacerbated a circuit conflict on this important and recurring question of federal law. Because federal injunctions of state proceedings, where appropriate under the relevant substantive law, are vital "to ensure the effectiveness and supremacy of federal law," *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988), this Court should grant review to resolve the conflict.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the Court should grant a writ of certiorari.

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

August 2, 2010